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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF ITS MOTION TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

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The Government argues: (1) the $100 per day forfeitures are payable for non-compliance with the original Federal Trade Commission orders and not for non-compliance with the judicial order of enforcement, so that the stays of such judicial order which petitioner obtained did not affect the accumulation of forfeitures, and (2) petitioner failed to apply for a stay of the accrual of forfeitures until December 27, 1960 which was denied.

The complete answer to the Government's first argument is that petitioner was never required to comply with the Commission's orders as originally issued. Petitioner was required to answer only such of the Commission's questions as were specifically enumerated in the district court's order and judgment of April 21, 1960*.

* Transcript of Record, pp. 213-216.

The requirement to answer those Commission questions was suspended during the period of the stays granted by the district court on June 20, 1960, and by the court of appeals on July 8, 1960 and January 10, 1961. There is no merit in the distinction attempted to be made by the Government, namely, that the "accrual [of the forfeitures] could have been terminated only by a stay of the Commission's order directing the submission of the reports. The district court order of June 20, 1960 and the court of appeals order of July 8, 1960, however, did not stay the Commission's orders, but only the district court's order of April 21, 1960."*

To accept the proposition that forfeitures result from non-compliance with the original Commission orders, rather than from non-compliance with the valid parts of those orders which the district court enforced, would lead to the absurd result that forfeitures continue to accrue despite the delivery by petitioner to the Government of the documents required by the last category of questions (request for copies of census reports) which were furnished the Government on January 23, 1962.

The Government impliedly concedes (see footnote 4, p. 6) that the accumulation of forfeitures stopped when petitioner complied with the district court's order by the delivery of all documents required by such order. It must logically follow that the prior suspension of the same order by the stays described in petitioner's motion (at page 2) also stopped the running of forfeitures.

The distinction which the Government makes is inconsistent with this Court's holding that "* * * the court's order was not in substitution of the Commission's orders

* Government Brief, p. 7. Similarly at page 4 of the Brief it is urged that the stay orders "* * * did not stay the Commission's orders directing petitioner to submit the special reports. They merely stayed those portions of the district court's judgment that directed petitioner to answer certain questions within 60 days."

but merely an enforcement of them, in accordance with §9 of the F.T.C.A. authorizing the court to compel obedience to lawful Commission orders." (Slip opinion, p. 16.)

The Government's second argument, namely that petitioner failed to apply for a stay of the further accumulation of daily penalties until December 27, 1960, completely overlooks the fact that as early as June 20, 1960, petitioner had obtained a stay and suspension of the obligation to answer the remaining questions specified in the district court's order and judgment, i.e. those which had not been answered within 30 days after entry of the district court's order and judgment. The stays protected the petitioner from the further accumulation of the daily forfeitures for the period during which such obligation was suspended because during such period there was no "failure" to furnish reports within the meaning of the third unnumbered paragraph of Section 10 of the Federal Trade Commission Act,* the statute which provides for the forfeitures.

On December 27, 1960, at the same time that petitioner sought a stay of the court of appeals' mandate (thus continuing the suspension of the obligation to furnish the documents required to be furnished in the 60 day provision of the district court's order) it moved also for a postponement of the effective date of the Commission's orders until after the completion of review in this Court. But this additional application was not, as the Government suggests in its brief (page 5), an application for a stay of the further accrual of forfeitures. It was an application made pursuant to, and in the language of, Section 10(d) of the Administrative Procedure Act** which, if granted, would have completely postponed the effective date of the Commission's orders until after the completion of judicial

* 38 Stat. 722 (1914); 15 USC §46 (1958).
** 60 Stat. 243 (1946); 5 USC §1009(d) (1958).

review. Such relief, therefore, would have eliminated all forfeitures, not merely the further accumulation thereof which was accomplished by the stay of the court of appeals' mandate.

The application was made immediately following the court of appeals' reversal of the district court's judgment denying forfeitures. This was the first time any court had held petitioner liable for forfeitures. Such application was not untimely because Section 10(d) authorizes "• • • every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) • • •" to grant the relief requested.

Petitioner should not be prejudiced for having asserted its right to relief under such Section 10(d) at that time or because the court of appeals and this Court, when the motion was renewed here, failed to grant the relief in the form as requested.

The concurring statement by Judge Lumbard (R. 235) that he "would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this Court is stayed", in our view, was unnecessary and apparently was so regarded by the majority of the court of appeals judges. The grant of the stay of mandate necessarily suspended the accumulation of forfeitures.

The petitioner's motion dated February 7, 1961, to this Court, which accompanied the petition for certiorari, was also made pursuant to Section 10(d) of the Administrative Procedure Act "for an order postponing the effective date of investigative orders issued by the Federal Trade Commission to petitioner and its former subsidiaries pending final determination in this Court of petitioner's petition for a writ of certiorari • • •". On consideration of

that motion, however, in the order granting certiorari, this Court added at the end thereof a reference to petitioner's motion, but granted such motion "to the extent of tolling, as of the filing of its petition on February 7, 1961, and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under §10 of the Federal Trade Commission Act, * * *".

We respectfully submit that the language limiting the grant of the motion "to the extent of tolling" as of the filing of the petition for certiorari was unnecessary in view of the stay granted by the court of appeals, which suspended the further running and accumulation of forfeitures, and which, under Rule 28(c)(2) of the Rules of that Court "continue[d] until the final disposition of the case by the Supreme Court * * *."

There was no failure on the part of petitioner at each stage of this litigation to request either (1) the remittance of the original Commission orders to the Commission for further consideration by the Commission and issue of new proper orders in accordance with the determination of the district court, or (2), when the district court determined that such procedure was impractical and "silly" (R. 210) and ordered compliance with the valid portions of the Commission's orders, a stay and suspension of the requirement to comply with such valid portions. Neither the fact that such stays were phrased in terms that suspended the district court's order (which specifically set out the valid Commission questions) nor that this Court and the court of appeals refused to grant the relief which was requested under Section 10(d) of the Administrative Procedure Act, should operate to prejudice petitioner, especially in a case of first impression, in the final decision of which three Justices of this Court have dissented. This Court should also give due consideration to the fact that petitioner was upheld by the district court

in petitioner's objections to more than a majority of the Commission's questions to petitioner and the Government did not appeal.

The final judgment of this Court should contain such directions to the district court for the entry of a judgment of that court for the amount to be paid by petitioner which will give effect to the stays granted in the courts below and in this Court. The present judgment of this Court dated December 11, 1961 (received by the district court January 19, 1962) fails to contain such direction.

For the reasons stated petitioner's motion should be granted and the judgment of this Court should be recalled and corrected or amended so that the judgment to be entered in the district court shall give full effect to all of the stays granted not only in this Court but also in the lower courts, all of which suspended the accumulation of forfeitures.

Respectfully submitted,

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February, 1962